

HONORABLE RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

STELLAR J CORPORATION, a Texas
corporation,

Plaintiff,

v.

ARGONAUT INSURANCE COMPANY,
an Illinois corporation,

Defendant.

and

UNISON SOLUTIONS, INC., an Iowa
corporation,

Defendant and Third-Party Plaintiff,

v.

TRAVELERS CASUALTY AND
SURETY COMPANY OF AMERICA;
XCHANGER, INC., a Minnesota
corporation; and RHODE BROTHERS,
INC., a Wisconsin corporation,

Third-Party Defendants.

CASE NO. 3:12-cv-05982 RBL

ORDER DENYING DEFENDANT'S
MOTION TO DISMISS

1 SulfrStrip system did not work on that project, either, and it too had to be replaced with a media-
2 based sulfur removal system.

3 Stellar J's Second Amended Complaint alleges that Unison was aware that SulfrStrip was
4 unreliable and knew that it would impose additional costs on Stellar J. Stellar J further claims
5 that Unison affirmatively represented its SulfrStrip system would perform the required functions,
6 or alternatively, that Unison failed to disclose SulfrStrip's defects where it had a duty to do so.
7 Stellar J claims that it relied on Unison's representations or omissions, leading to \$2,644,307.21
8 in damages when SulfrStrip had to be replaced.

9 Unison seeks dismissal of this claim because it fails to state with particularity the specific
10 circumstances of the alleged fraud as required by Rule 9(b). Stellar J responds by asserting that
11 Unison engaged in fraudulent "concealment" rather than commission, so only Unison could
12 possess the knowledge of the circumstances constituting fraud. In its response to the Motion to
13 Dismiss, Stellar J points to a number of emails between Unison personnel revealing concerns
14 about the functionality of the SulfrStrip system, and its failures at City Brewery. These were not
15 referenced in the Complaint. Stellar J requests leave to amend its Complaint if the Court finds
16 that it has failed to plead sufficient facts with particularity.

17 II. Discussion

18 Dismissal under Rule 12(b)(6) may be based on either the lack of a cognizable legal
19 theory or absence of sufficient facts alleged under a cognizable legal theory. *Balistreri v.*
20 *Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). A plaintiff's complaint must allege
21 facts to state a claim for relief that is plausible on its face. *See Ashcroft v. Iqbal*, 129 S.Ct. 1937,
22 1949 (2009). A claim has "facial plausibility" when the party seeking relief "pleads factual
23 content that allows the court to draw the reasonable inference that the defendant is liable for the
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1 misconduct alleged.” *Id.* Although the Court must accept as true the Complaint’s well-pled
2 facts, conclusory allegations of law and unwarranted inferences will not defeat an otherwise
3 proper [Rule 12(b)(6)] motion. *Vasquez v. L. A. County*, 487 F.3d 1246, 1249 (9th Cir. 2007);
4 *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). “[A] plaintiff’s obligation
5 to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions,
6 and a formulaic recitation of the elements of a cause of action will not do. Factual allegations
7 must be enough to raise a right to relief above the speculative level.” *Bell Atl. Corp. v. Twombly*,
8 550 U.S. 544, 555 (2007) (citations and footnote omitted). This requires a plaintiff to plead
9 “more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” *Iqbal*, 129 S.Ct. at
10 1949 (citing *Twombly*).

11 Additionally, a party alleging fraud must “state with particularity the circumstances
12 constituting fraud,” but “[m]alice, intent, knowledge, and other conditions of a person’s mind
13 may be alleged generally.” Fed.R.Civ.P. 9(b). To comply with Rule 9(b), allegations of fraud
14 must state “the who, what, when, where, and how” of the misconduct charged. *Cafasso v.*
15 *General Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1055 (9th Cir. 2011). This heightened pleading
16 standard ensures that defendants have adequate notice of the alleged misconduct so that they can
17 defend against the charge and are not left to simply deny that they have done anything wrong.
18 *Kerns v. Ford Motor Co.*, 567 F.3d 1120, 1124 (9th Cir. 2008). “A pleading is sufficient under
19 Rule 9(b) if it identifies the circumstances constituting fraud so that the defendant can prepare an
20 adequate answer from the allegations.” *Neubronner v. Milken*, 6 F.3d 666, 671-72 (9th Cir.
21 1993) (citing *Gottreich v. San Francisco Inv. Corp.*, 552 F.2d 866, 866 (9th Cir. 1977)) (internal
22 quotations omitted).

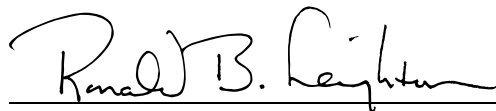
1 On a 12(b)(6) motion, “a district court should grant leave to amend even if no request to
2 amend the pleading was made, unless it determines that the pleading could not possibly be cured
3 by the allegation of other facts.” *Cook, Perkiss & Liehe v. N. Cal. Collection Serv.*, 911 F.2d 242,
4 247 (9th Cir. 1990). However, where the facts are not in dispute, and the sole issue is whether
5 there is liability as a matter of substantive law, the court may deny leave to amend. *Albrecht v.*
6 *Lund*, 845 F.2d 193, 195–96 (9th Cir. 1988).

7 Though Stellar J’s amended Complaint fails to specify the “who, what, when, where, and
8 how” of the alleged fraud, it has the material to easily remedy the deficiencies. A potentially
9 viable claim should not be dismissed entirely for failing to meet the pleading requirements of
10 Rule 9(b), when an amended pleading could easily remedy the Defendant’s objections without
11 prejudice.

12 Unison’s Motion to Dismiss is **DENIED**. Stellar J should amend its Complaint to allege
13 the specifics of its fraud claim within 21 days of this Order.

14 IT IS SO ORDERED

15 Dated this 23rd day of July, 2014.

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18 RONALD B. LEIGHTON
19 UNITED STATES DISTRICT JUDGE
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